PRACTICAL TIPS

It Takes Two to Cooperate

By Joseph Siprut, Novack and Macey LLP, Chicago

Suppose a young junior associate issues a set of document requests to opposing counsel during discovery. The deadline to respond to the requests comes and goes, and the associate receives no documents, no response, and no indication from opposing counsel that the response is forthcoming. The associate attempts to call opposing counsel, but his calls are not returned. A week later, the associate writes a letter to opposing counsel, reminding him of his obligation to respond to the document requests. More silence. Finally, several weeks past the deadline, the associate sends another letter, this time stating that if no response is received in a timely manner, the associate will have no alternative but to file a motion to compel. One week later, still having heard nothing, the associate files the motion and notices it for hearing.

The morning of the hearing, the opposing lawyer approaches the associate in court and hands him the documents. When the case is called, the judge is annoyed to waste her time on a moot motion and she treats both lawyers to a lecture on the importance of cooperation and the scarcity of judicial resources.

Sound familiar? Judges are impatient with lawyers who file, or oppose, discovery motions that could have been avoided if the lawyers had communicated with one another. But as we saw in the above hypothetical, the problem is that it takes two to cooperate.

No doubt many lawyers have had the unenviable experience of dealing with opposing counsel who proves to be downright uncooperative with, and even hostile to, attempts to address discovery concerns without the court's involvement. Because it takes two to cooperate, however, it only takes one uncooperative lawyer to forestall the efforts of the other lawyer to try and work out discovery disputes without the court's involvement. And when this occurs, it can make both lawyers look bad.

However unfair this may be, it is a situation unlikely to change anytime soon. But there are steps any lawyer can and should take to counteract the effects of an uncooperative and hostile opposing lawyer:

- For starters, document the history of your attempts to communicate in letters to opposing counsel. For example, if your phone calls are not returned and you write a follow-up letter several days later, make sure you reference the previous phone call, and the fact that it was not returned. If the letter was not returned, then your next letter should reference the previous letter as well as the phone call, and so forth.
- Similarly, when drafting the motion itself, lay out the history of your attempts to communicate. Be sure to append the correspondence to your motion to compel to substantiate and evidence your attempts to resolve the dispute before the motion was filed.
- If you find yourself in a situation such as the one described in the hypothetical above, stick to the facts. Calmly point out to the judge that you made every effort to cooperate with opposing counsel, but that these attempts were not well received. Refer her to your motion, which, if drafted properly, will set forth the history of these communications.
- Finally, wear the white hat, particularly as a young lawyer. Resist the temptation to denigrate the opposing attorney or engage in ad hominem attacks, and ignore any attacks directed at you. Such discussions do not advance what should be your agenda before the judge: procuring an order that the documents be produced (if they have not already been produced), and making the judge aware of your attempts to communicate in good faith with opposing counsel.♦

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In This Issue

Do Not Delete: Sanctions for Spoliation of Electronic Evidence

By Steven A. Weiss, Schopf & Weiss LLP, Chicago

The proportion of evidence that is produced in electronic form has increased exponentially during the last several years. Almost all cases now involve the production of e-mails, and most cases involve significantly greater productions of documents and data in electronic form. Because of the prevalence of electronic documents, and the ease with which they can be deleted, it is not surprising that most of the recent sanctions cases for spoliation of evidence have been in the electronic arena. While much has been written on the standards for retention of electronic evidence, the methods by which spoliation is detected, and the consequences of spoliation, this article seeks to categorize the types of sanctions that have been awarded for electronic spoliation, and the circumstances in which they are awarded.

(Continued on page 6)

Sanctions 2005

By Gregory P. Joseph, Gregory P. Joseph Law Offices LLC, New York

This article highlights important sanctions decisions in the 18 months since the topic was addressed in the *National Law Journal*, June 23-30, 2003, at 30.

Unsafe Harbors

The safe harbor provision of Rule 11(c)(1)(A) requires that any Rule 11 motion be served at least 21 days before the motion is filed with the court, to afford the offender the opportunity to withdraw the challenged paper. Once judgment is rendered or an action dismissed, it is too late for a party to move for Rule 11 sanctions because it is impossible to comply with the safe harbor. *See, e.g., Brickwood Contractors, Inc. v. Datanet Engr'g, Inc.*, 369 F.3d 385, 397-99 (4th Cir. 2004) (en banc).

In expedited proceedings that are promptly dismissed or adjudicated, it may be impossible as a matter of fact for the injured party to comply with the 21-day requirement. What if a Rule 11 motion has been made but the case is dismissed or adjudicated prior to the expiration of the safe harbor? May the court act on the motion, even though 21 days have not in fact been afforded the target? The court in *Joseph Giganti Veritas Media Group, Inc. v. Gen-X Strategies, Inc.*, 222 F.R.D. 299 (E.D. Va. 2004) imposed Rule 11 sanctions where the motion had been filed concurrently with a dismissal motion 20 days before the offending papers were dismissed. The court reasoned that, by not requesting any additional time at the argument on the dismissal motion (and, instead, vigorously urging the sanctionable positions), the offender had forfeited the remaining few hours of the 21-day period.

The absence of a predismissal motion raises problems illustrated by the Seventh Circuit's decision in *Methode Elecs., Inc. v. Adam Techs., Inc.*, 371 F.3d 923 (7th Cir. 2004), in

(Continued on page 3)

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